Supreme Court, U.S.
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No. 87-2072

In The
Supreme Court of the United States
October Term, 1987

HOWARD YOUNG,

Petitioner,

v.

GENERAL FOODS CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals applied the proper standards when it evaluated the decision of the District Court to grant the employer's motion for summary judgment in an age discrimination claim.

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STATEMENT OF THE CASE

On March 21, 1988, a unanimous panel of the Court of Appeals for the Eleventh Circuit affirmed a grant of summary judgment for General Foods Corporation ("Respondent").[1] It held that Howard Young ("Peitioner") had not established an essential element of his case; he did not introduce evidence to show that Respondent's reasons for discharging him were a pretext for age discrimination. (Appendix to Petition for a Writ of Certiorari to the United States Courts of Appeals for the Eleventh Circuit (hereinafter "App."), p. 7).

Petitioner recites a number of allegations concerning his job performance without any citation or reference to a record (Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (hereinafter "Petition"), pp. 10-11). Respondent disputes Petitioner's allegation that he held "essentially the same sales representative position" for over twenty years (Petition, p. 10). Petitioner became a military sales representative for Respondent in 1963 (App. 7). Respondent upgraded all military sales representatives' positions to Territory Sales Managers and increased the salary grade because of substantial changes in the military sales sector (App. 7-8). Respondent disputes Petitioner's allegation that he "usually ranked in the middle among the other territorial sales managers" (Petition, p. 11). At about the same time that Respondent upgraded the positions, Petitioner's supervisor noted that Petitioner "tended to become lax at times" and failed to exceed budget projections for two of the four quarters (App. 42).

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1 General Foods Corporation is a subsidiary of Philip Morris Companies, Inc.

In April 1982, Respondent assigned a new supervisor to the southeast region where Petitioner worked (App. 7, 9). Between April and November 1982, Petitioner's supervisor told him several times to develop a new plan of action for sales presentations; there is no dispute that Petitioner did not develop any new plans (App. 9, 42). In October 1982, Petitioner received a six month evaluation for the fiscal year which noted that his volume growth did not keep pace with the growth in other southeast territories and that his performance did not meet expectations (App. 10-11). In November 1982, Respondent placed Petitioner on probation and told him that he would be subject to termination unless he showed substantial progress by May 1983 (App. 11).

In May 1983, Petitioner received an evaluation for the fiscal year, which showed that his sales and budget performance continued to rank below the region's average; he remained on formal probation (App. 11-12). In November 1983, Petitioner's supervisor again evaluated his performance and noted that some of Petitioner's customers were the only ones who did not stock certain items, that Petitioner did not complete sales presentations and did not present any business building ideas (App. 12). An illusory improvement in Petitioner's volume figures was due to sales of a product that was sold only in Petitioner's territory (App. 13). When his supervisor recomputed the volume figures without this product, to more accurately compare Petitioner's performance vis-a-vis the other Territory Sales Managers, Petitioner's volumes were last in the region (App. 13).

As a result of his unsatisfactory performance, Respondent notified Petitioner in a memorandum dated No-

vember 14, 1983 that he would be discharged (App. 13-14). Petitioner's supervisor did not advise Petitioner that he "would change his mind concerning [Petitioner's] termination" if he would retire, as Petitioner alleges (Petition, pp. 11-12). Respondent only offered Petitioner the opportunity to retire to avoid being discharged (App. 31-32). When Petitioner refused, Respondent discharged him effective December 1, 1983 and assigned a person younger than Petitioner to the Territory Sales Manager position (App. 14, 34).

SUMMARY OF ARGUMENT

This Court should not grant a writ of certiorari because the Eleventh Circuit Court of Appeals precisely applied the standards established by the United States Supreme Court to evaluate an employment discrimination claim and to review the appropriateness of a grant of summary judgment. Further, the cases that Petitioner cites in an effort to create a "conflict" in the decisions of the courts of appeals show no conflict because each case presents facts that are easily distinguishable from the instant case.

ARGUMENT

POINT I

NO SPECIAL AND IMPORTANT REASONS EXIST FOR A WRIT OF CERTIORARI BECAUSE THE ISSUE BEFORE THE ELEVENTH CIRCUIT COURT OF APPEALS HAS BEEN SETTLED BY THIS COURT AND THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT.

A. The United States Supreme Court Has Rejected The Standard For Summary Judgment That Petitioner Argues Should Apply.

The United States Supreme Court has noted that summary judgment procedures should not be considered as a "disfavored procedural shortcut, but rather as an integral part of the Federal Rules . . . designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). *Accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Without mentioning these Supreme Court decisions, Petitioner asserts that the Fifth Circuit, in a case decided before *Celotex, Anderson* and *Matsushita*, set forth "the proper role of summary judgment in an employment discrimination case," when it held that summary judgent was generally inappropriate in employment discrimination claims that involve motive and intent. *Thornbrough v. Columbus and Greenville Railroad Company*, 760 F.2d 633, 640 (5th Cir. 1985). In *Thornbrough*, the Fifth Circuit Court of Appeals reversed summary judgment for the employer, despite the sparseness of the plaintiff's proof be-

cause "through the dim mists, we perceive a thin vapor." *Thornbrough, supra,* at 648.

The Supreme Court soundly rejected the guidelines enunciated in *Thornbrough* when it decided *Anderson, Celotex* and *Matsushita.* In *Anderson,* this Court held that the standard for granting summary judgment mirrors the standard for a directed verdict. *Anderson, supra,* at 250. As a result, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. This standard for summary judgment applies even in a case in which "state of mind is at issue." *Id.* at 256.

Thus, the *Thornbrough* decision does not set forth the proper standards for summary judgment. A scintilla or thin vapor of evidence is not sufficient to overcome a motion for summary judgment. The court below appropriately ignored *Thornbrough.* The Eleventh Circuit properly applied the standards set forth by the Supreme Court when it evaluated the evidence presented by Petitioner in his attempt to show that Respondent's legitimate, nondiscriminatory reason was pretextual.

B. The Eleventh Circuit Applied The Proper Standard In Evaluating Whether Petitioner Set Forth Specific Facts To Show The Existence Of A Genuine Issue For Trial.

Petitioner grossly distorts the record when he claims that the court below noted that since he "had held his position for some period of time, it would be inferred that his job performance was sufficiently satisfactory to present a prima facie case" (Petition, pp. 14-15). In foot-

note 3 (which, along with all other footnotes, was omitted from the court's decision set forth in Petitioner's Appendix), the Eleventh Circuit Court of Appeals noted that when a plaintiff has held a job for a long period of time, the court may infer that he was qualified for the job. *Young v. General Foods Corp.*, 840 F.2d 825, 829-30 n.3 (11th Cir. 1988). However, the court went on to hold that "because General Foods has asserted poor job performance as its reason for firing Young, *we need not decide* whether Young is entitled to an inference of qualification." *Id.* (emphasis added).

The court below then focused on whether there was sufficient evidence of poor performance and whether Petitioner submitted sufficient evidence to show that the reason for discharge was merely a pretext for age discrimination. *Id.* This is consistent with the burdens and order of proof set forth in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The Eleventh Circuit ruled that Respondent had submitted "overwhelming evidence" that it discharged Petitioner for poor performance (App. 27). Citing *Celotex* and *Anderson*, the court held that Petitioner then had to present probative evidence of pretext to avoid summary judgment (App. 22). All that Petitioner produced was an affidavit in which he made unsubstantiated claims that his sales figures were good and his work performance was satisfactory (App. 28). Essentially, he simply alleged that some sales figures were inaccurate, that his supervisor recomputed one set of volume figures and that his supervisor offered him the option to retire rather than be discharged (App. 29).

Although Petitioner claimed that some sales figures were inaccurate, he did not contest most of the objective information in the evaluations and even admitted that he could not prove that his supervisor was wrong (App. 29-30). In response to the overwhelming evidence of poor performance, Petitioner actually contested only *two* figures (App. 30). In one case, although Petitioner contested the value that was used, he did not deny that the bottom line was correct, that is, his volume contribution had slipped (App. 30).

In the other case, Petitioner's supervisor had recomputed figures in only one instance by deleting sales figures of a new product that Petitioner was test-merchandising in his area (App. 30-31). Petitioner did not dispute that he was the only Territory Sales Manager in the region who was selling the new product (App. 30-31). The supervisor deleted the new product sales figures to more accurately compare Petitioner's sales figures and volumes with those of other Territory Sales Managers who did not sell the product (App. 31).

Finally, Petitioner did not dispute that his supervisor suggested that Petitioner retire only after the supervisor had decided to discharge Petitioner (App. 31). Thus, the offer to allow Petitioner the opportunity to retire had no connection with the decision to discharge him (App. 31-32).

The court below properly determined that Petitioner did not come forward with any probative evidence that Respondent's legitimate, nondiscriminatory reason was pretextual. At most, he presented only conclusory allegations. Because he did not "establish the existence of an element essential to [his] case," and on which he had the burden of proof at trial, summary judgment was required.

Celotex, supra, at 323. The Court of Appeals properly evaluated Petitioner's claim as required by *Burdine,* the Federal Rules of Civil Procedure and the Supreme Court's interpretation of those Rules.

C. Petitioner Was Not Deprived Of The Opportunity To Cross-Examine Witnesses.

Citing *Burdine,* Petitioner argues that pretext may be demonstrated by effective cross-examination of the employer's witnesses and that the entry of summary judgment deprived him of the opportunity to cross-examine the witnesses (Petition, p. 16).[2] Petitioner's argument is specious. Respondent did not move for summary judgment until after the close of discovery (App. 35). Petitioner had every opportunity to cross-examine Respondent's witnesses by taking depositions during discovery and in fact, he did. Petitioner even had the opportunity to take the depositions in the district where he filed suit.[3]

Petitioner's argument, if accepted, would eliminate summary judgment and permit trial of even the most frivolous claims if the plaintiff's lawyer simply avoided

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2 Petitioner apparently derives this argument from a footnote in *Burdine* despite his omission of the footnotes in the decision of the court below. The *Burdine* court noted that "there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Burdine, supra,* at 255 n. 10.

3 The local court rules provide that:

> It is the general policy of the Court . . . that a non-resident defendant who intends to be present in person at trial may reasonably be deposed at least once in this District either during the discovery stages of the case or within a week prior to trial.

Rule 3.04(c), Rules of the United States District Court for the Middle District of Florida.

discovery. Such a result hardly secures "the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1; *Celotex, supra,* at 327. It fails "to isolate and dispose of factually unsupported claims." *Celotex, supra,* at 323-324. It also ignores the clear requirement of the Federal Rules that, to avoid summary judgment, Petitioner "must set forth specific facts showing that there [was] a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson, supra,* at 250. Speculation about what Petitioner might elicit during cross-examination does not constitute "specific facts." When a party opposing summary judgment does not respond with specific facts as Petitioner did not, the Federal Rules require that summary judgment be entered against him. Fed. R. Civ. P. 56(e); *Celotex, supra,* at 323.

Thus, this Court has settled the question of when summary judgment is appropriate. The unanimous decision of the Eleventh Circuit Court of Appeals panel is entirely consistent with the applicable decisions of this Court and there is no reason for this Court to issue a writ of certiorari to review the decision of the court below.

POINT II

PETITIONER DID NOT ESTABLISH THAT THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS BECAUSE EACH CASE CITED BY PETITIONER PRESENTED FACTS THAT ARE EASILY DISTINGUISHABLE FROM THE FACTS OF THE INSTANT CASE.

A. This Court Should Not Issue A Writ Of Certiorari To Resolve A Conflict Within A Circuit.

Petitioner compares his case to *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493 (11th Cir. 1987).

Such a comparison is inappropriate because the facts in *Rosenfield* are dramatically different from those in the instant case.[4] Further, even if there were a lack of uniformity in the decisions of the Eleventh Circuit, it does not constitute a reason for review by this Court. See Sup. Ct. R. 17. It is the Court of Appeals' task to reconcile intra-circuit conflicts. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). Petitioner should have requested a rehearing by the panel pursuant to Fed. R. App. P. 40(a) or a hearing by the Court of Appeals in banc. Fed. R. App. P. 35(a); 11th Cir. R. 35-3.

B. The Cases Relied Upon By Petitioner Do Not Establish A Conflict With The Decision Of Another Circuit.

In an attempt to show a conflict among the courts of appeals, Petitioner compared the decision of the court below with *Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133 (8th Cir. 1985); *Stacey v. Allied Stores Corp.*, 768 F.2d 402 (D.C. Cir. 1985); and *Reeves v. General Foods Corp.*, 682 F.2d 515 (5th Cir. 1982). These cases fail to show that any conflict exists among the courts of appeals because the cases do not apply a different rule of law from that applied by the Eleventh Circuit Court of Appeals and in each cited case, the plaintiff presented probative evidence on the issue of pretext. In the instant case, Petitioner did not present any probative evidence.

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4 In *Rosenfield*, there was evidence that (1) the plaintiff had an extraordinary work record; (2) evidence of poor work performance was created after the discharge; (3) the reason for discharge (failure to complete a project on time) was pretextual because the project was not due until after the discharge; and (4) the employer treated younger workers differently when they had performance issues. *Rosenfield, supra*, at 1496.

Petitioner notes that the *Gilkerson* court "held that the mere articulation of an alleged legitimate non-discriminatory reason does not entitle the defendant to a judgment NOV" (Petition, p. 21). That holding is entirely consistent with the Eleventh Circuit's decision in the instant case. Respondent's articulation of a legitimate, nondiscriminatory reason did not end the analysis for the court below. The court examined Petitioner's "evidence" of alleged pretext and found that there was no probative evidence and no genuine issue for trial (App. 32-33).

In contrast, the *Gilkerson* plaintiff introduced specific facts as evidence of pretext. The employer's articulated reason for discharge was plaintiff's alleged unsatisfactory sales performance, poor customer relations, lack of motivation and failure to work closely with accounts. Unlike the instant case, the *Gilkerson* plaintiff produced evidence that six years before discharge, he was one of two top salesmen; two years before discharge, he was the top salesman in his region; none of the other salesmen made their quotas; and the plaintiff had good customer relations according to the testimony of three customers. *Gilkerson, supra,* at 136. Thus, there is no conflict between the *Gilkerson* decision and that of the court below.

There is also no conflict between the *Stacey* case and the instant case. Petitioner again distorts the facts when he implies that the only issue in *Stacey* concerning pretext was the credibility of the employer's witnesses (Petition, p. 23). There was a great deal more than that.

When Stacey's job was eliminated in an office closing, the employer did not consider him for other jobs because of alleged unsatisfactory performance. *Stacey, supra,* at 404. However, the plaintiff introduced evidence that the

employer had never articulated the alleged poor performance at any time before trial, not even in its response to the District of Columbia Office of Human Rights; there was also substantial, uncontroverted testimony that the plaintiff was a highly respected manager who had received recognition from senior management. *Id.* at 407. Credibility became an issue because of evidence that the plaintiff's supervisor had personal animosity towards the plaintiff and, on a number of occasions, had said how he was proud of his "cadre of young chargers." *Id.* at 408. The evidence in *Stacey* was very different from that in the instant case, in which Petitioner did not introduce probative evidence to show pretext. Thus, the cases do not conflict.

Finally, the *Reeves* case does not conflict with the instant case. Like the Eleventh Circuit, the *Reeves* court required the plaintiff "to introduce substantial evidence" that the employer's articulated reasons were pretextual. *Reeves, supra,* at 523. Unlike Petitioner, Reeves presented evidence that he had received a good evaluation and a recommendation for a substantial salary increase only months prior to his discharge; he had received several memoranda praising his performance during the period when it was supposed to have been unsatisfactory. *Id.* at 524. The only customers who testified, stated that Reeves' performance was good. *Id.*

Petitioner presented no evidence like that produced by the plaintiffs in *Gilkerson, Stacey* and *Reeves.*[5] As a

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5 Petitioner did argue that he had received raises and bonuses during his career (Petition, p. 18). While that may be

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result, these cases are readily distinguishable and do not show that a conflict exists among the courts of appeals. Thus, there is no reason for this Court to review the decision of the Eleventh Circuit in this case.

CONCLUSION

The District Court and the Eleventh Circuit Court of Appeals correctly applied the law according to *Burdine* when they required Petitioner to come forward with probative evidence to rebut Respondent's legitimate, nondiscriminatory reason for discharging him. When Petitioner failed to present specific facts to challenge Respondent's substantial evidence of poor performance, summary judgment was properly granted for Respondent. The Eleventh Circuit, following this Court's instruction in *Anderson*, *Celotex* and *Matsushita*, applied the proper standard in evaluating and affirming the grant of summary judgment.

Petitioner has failed to show that the Eleventh Circuit's decision conflicts with a decision of this Court or of another court of appeals. The facts in the cases that Petitioner cites are readily distinguishable from the facts in the instant case.

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true, the Eleventh Circuit noted that all Territory Sales Managers received bonuses in equal amounts, based on overall region performance, not individual performance (App. 8).

No special and important reasons exist for this Court to review the Eleventh Circuit Court of Appeals' decision. For the reasons set forth above, this Court should not issue a writ of certiorari.

Respectfully submitted,

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